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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-561

NEW YORK NEWS INC.,

Petitioner,

—against—

HONORABLE HOWARD E. BELL, a Justice of the Supreme Court of the State of New York, and ROBERT DAVIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

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October 4, 1979

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

The petitioner New York News Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of New York entered in this proceeding on July 9, 1979.

Opinions Below

The opinion of the Court of Appeals, which affirmed the judgment of the Supreme Court, Appellate Division (First Department), denying petitioner's application for an order in the nature of a writ of prohibition prohibiting respondent Bell from excluding the press and the public from a pretrial suppression hearing, is reported at 47 N.Y.2d 985, — N.E.2d —, — N.Y.S.2d — (1979). The opinion of the Appellate Division is reported at 68

App. Div. 2d 24, 415 N.Y.S.2d 992 (1st Dep't 1979). Both opinions, the order of the Appellate Division entered in this case and excerpts from the transcript of the proceedings before respondent Bell at the time he entered the order of closure challenged by petitioner in the Appellate Division appear in the Appendix.

Jurisdiction

The judgment of the Court of Appeals, State of New York, was entered on July 9, 1979. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Questions Presented

Whether members of the press and the public have a qualified First Amendment right to attend a pretrial suppression hearing.

Whether under the standards enunciated by this Court in *Gannett Co.* v. *DePasquale*, 47 U.S.L.W. 4902 (July 2, 1979), the press and the public can be excluded from a pretrial suppression hearing where counsel for the press makes timely objection, the prosecutor opposes closure, the trial court finds that the publicity has been moderate, the record supports that finding, and the county of venue has a population in excess of one million.

Constitutional Provisions Involved

United States Constitution, Amendment 1

"Congress shall make no law . . . abridging the freedom . . . of the press."

United States Constitution, Amendment 6

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

jury of the State and district wherein the crime shall have been committed. . . ."

United States Constitution, Amendment 14, Section 1

". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

Statement of the Case

The closure order which is the subject of this petition was pronounced shortly after the opening of a hearing to suppress certain evidence in the trial of Robert Davis.

I. The Davis Case

On September 19, 1978, John Hernandez was shot and killed by three assailants in a subway station in the Bronx, New York. Three days later, the police arrested Robert Davis, a 13-year-old, and charged him with the murder. The arrest was reported by local news media.

Davis was the first 13-year-old to be arrested and charged under the 1978 amendments to the New York Penal Law and Criminal Procedure Law. The new statutory provisions, which constituted a legislative response to problems of juvenile crime and juvenile criminal justice, worked major changes in the criminal law of the State of New York by rejecting the long-standing rule that juveniles under 16 years of age were not criminally responsible for their acts. Fourteen and 15-year-olds became criminally responsible for certain felonies, and 13-year-olds became criminally responsible for the crime of murder. New York Penal Law § 30.00 (McKinney's Supp. 1978). Jurisdiction of such cases was vested in the Supreme Court, altering the prior rule under which the Family Court had exclusive jurisdiction over

criminal proceedings involving persons under 16 years of age. Unlike Family Court proceedings, where adjudications and dispositions took place in secret, the trial of a teenage felon in Supreme Court was to take place in open court, like all other Supreme Court proceedings. *See* New York Judiciary Law § 4 (McKinney's 1968).

On October 31, 1978, a Bronx County grand jury indicted Davis for Hernandez' murder; on November 8, 1978, Davis was arraigned. The case was set for trial on March 19, 1979 before the Honorable Howard E. Bell, Supreme Court, Bronx County.

The announcement of the indictment and the arraignment was covered by the media. This and earlier coverage were never made the subject of a motion for change of venue or other relief on the ground that the publicity in any way prejudiced the defendant's right to a fair trial. During the succeeding four months the record discloses no media coverage of the case.

II. The Suppression Hearing and Closure Order

On March 19, 1979, Davis moved to suppress certain inculpatory statements which he had allegedly made while in custody and which had been videotaped by the police. Davis also moved to exclude the press and the public from the courtroom during the hearing on the suppression motion. It was argued that media reporting of Davis' statements and other evidence, which might later be suppressed, would prejudice prospective jurors and would lead to a denial of Davis' right to a fair trial. Justice Bell denied "for the time being" the motion to bar the press and the public, and directed that the hearing on the motion to suppress would begin the following morning.

The next day, March 20, upon invitation from the court, Davis renewed his motion to bar the press and the public from the courtroom during the suppression

hearing (3a).* The Assistant District Attorney opposed the motion (3a-4a). Justice Bell reserved decision and informed journalists in attendance that he would be willing to hear argument from an attorney for the press (6a).

That afternoon, the court heard further argument from Davis' counsel, the Assistant District Attorney and an attorney for petitioner New York News Inc. ("the News"). Defense counsel brought to the court's attention the only newspaper item mentioning the case in any of the three major daily newspapers in the City of New York (7a); an article of three two and one-half inch columns with accompanying photograph, published on page 13 of the March 20, 1979 New York Post. No coverage of the case had appeared in either the petitioner's newspaper, the Daily News, or the New York Times. During the course of argument, Justice Bell referred specifically to one television broadcast and one radio broadcast covering the court proceedings of the preceding day (2a-3a, 5a). The Assistant District Attorney once again opposed closure. She argued that the case was not a sensational or lurid one and that, to the extent that there was public interest in the case, it was squarely focused on judicial and prosecutorial accountability for implementing New York's new laws making juveniles criminally responsible for their acts in certain cases. She added that, given the large pool of potential jurors in Bronx County, a voir dire of the jury panel would be a sufficient safeguard of the defendant's right to a fair trial (7a-9a). Counsel for the News argued that to order closure in the face of the moderate publicity surrounding the Davis case would make closure the rule, not the exception, in violation of the First Amendment (10a-11a).

After argument and a lengthy robing-room conference, during which several alternatives to closure were recom-

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* Unless otherwise indicated, page numbers in parentheses refer to the Appendix annexed to this Petition.

mended by counsel for the News but rejected by Justice Bell or other counsel, the court ordered the courtroom closed and the press and the public excluded during the suppression hearing but allowed members of Davis' family and the victim's family to remain in the courtroom (8a, 11a). Justice Bell had earlier found that "there hasn't been that much publicity" (9a), that given the moderate level of publicity "there's no question . . . that we could obtain a jury" (9a) and that "we haven't had a great deal of publicity, not to the extent that I think his [Davis'] rights have been prejudiced" (10a). He observed that he was presented with a "borderline case" and virtually conceded that he was excluding the press and the public in an excess of caution based entirely on speculation as to future publicity (10a, 11a).

III. The Article 78 Proceeding in the Appellate Division

The News and Mario Merola, District Attorney of Bronx County, brought separate proceedings in the Appellate Division under Article 78 of the New York Civil Practice Law and Rules to challenge Justice Bell's closure order, seeking relief in the nature of prohibition. Oral argument was heard on both petitions on March 29, 1979. In orders entered May 10, 1979, the Appellate Division, by a 3-2 vote, denied the relief sought and dismissed the petitions.

Justice Sullivan wrote the Appellate Division's opinion. Ignoring the findings of the trial court, he characterized the publicity surrounding the Davis case as "extensive" and "considerable"; reporters, he said, "were . . . flocking to the courtroom" (13a, 14a). The Mayor's campaign against subway crime and the fact that Davis was the first 13-year-old to be prosecuted as an adult made the case one of "great interest" (15a). Without closure, it would be "highly unlikely" that Davis' alleged confession

would "escape the attention of most potential jurors in Bronx County" (17a).

Based on the foregoing, Justice Sullivan concluded that permitting media access to the pretrial hearing would create a "reasonable probability of prejudice which would threaten the impaneling of a constitutionally impartial jury" (16a). The public's interest in the new juvenile offender laws could be satisfied in the "innumerable trials" of juveniles under those laws that could be expected in the future (17a). In response to the dissent's concern that upholding Justice Bell's order would make closure the rule and not the exception, Justice Sullivan relied solely on the "discernment and sensitivity of our trial judges" (19a).

In a brief concurrence, Justice Lupiano found the closure ordered by Justice Bell to be "limited" and to be clearly warranted in order to safeguard "the defendant's *primary* right to a fair trial" (21a) (emphasis in original). Justice Sandler, also concurring, noted that the issues raised were "both close and difficult" but agreed with the majority primarily because this case involved a 13-year-old defendant (19a), thereby ignoring one of the avowed purposes of the statute under which the defendant was being prosecuted—to open proceedings against juveniles to the public.

Justices Silverman and Ross, dissenting in an opinion written by Justice Silverman, pointed to the factual distinctions between the Davis case and the facts as set forth in the opinion of the Court of Appeals in *Gannett Co.* v. *DePasquale*, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1978), *aff'd*, 47 U.S.L.W. 4902 (July 2, 1979). They noted that the crime involved here—a robbery and murder on a subway platform—was hardly an uncommon one for New York City, that neither the victim nor the defendant was widely known, and that the county of venue had a population of 1½ million, con-

siderably greater than the 36,000 in *Gannett* (24a). Drawing on their experience as trial judges in criminal cases in New York City, the dissenters pointed out that even in cases of widespread publicity many prospective jurors are found to be completely unfamiliar with, and therefore untainted by, media reports (25a). Here, the dissenters said, "we doubt that more than a small percentage of prospective jurors will even have heard of this case" (25a). They concluded: "If the present state of facts requires closing the courtroom during the suppression hearing, we fear that it would be necessary to close the courtroom in a high percentage of suppression hearings in cases where there is any publicity at all" (26a).

IV. The Decision on Appeal

In a memorandum decision, the New York Court of Appeals, relying on its decision in *Gannett Co.* v. *DePasquale*, *supra*, shortly after that decision had been affirmed by this Court, affirmed the Appellate Division's dismissal of the Article 78 petitions. The court found that the requirements enunciated in its *Gannett* decision were fulfilled by affording the press redacted transcripts of the suppression hearing, with complete transcripts made available when "defendant's interests [are] no longer in jeopardy" (30a). The court, however, made two criticisms of Justice Bell's order. It noted that the trial court has a nondelegable duty to redact transcripts of the pretrial suppression hearing and that a trial court should not stay trial proceedings pending collateral appeals by the press and the public (31a).

V. Subsequent History

On August 10, 1979, Davis pleaded guilty to felony murder, New York Penal Law § 125.25[3] (McKinney's 1975), and his case was removed from the Supreme

Court, Bronx County to the Family Court for sentencing. The pretrial suppression hearing was never held.

How Federal Question is Presented

The question of the press and the public's federal constitutional right to attend a pretrial suppression hearing and the accused's constitutional right to a fair trial was raised prior to the commencement of the pretrial suppression hearing in the Davis case. Justice Bell expressed his concerns "about the Sixth Amendment rights of this defendant" (6a), noting that "[o]nce again the Court is confronted with those two Constitutional rights and the Courts have indicated that this Court does have the power to exclude the press from pretrial hearings" (6a).

Counsel for the News presented the relevant constitutional arguments in opposing Justice Bell's closure order (10a-11a). The Assistant District Attorney also stated that the People were opposed in this case to any ban on the press or the public's right to know (3a-4a, 7a-8a). The constitutional issues were briefed by the parties both in the Appellate Division and the Court of Appeals and were discussed by those courts in their opinions.

The controversy here is not moot. The two conditions set forth in *Gannett Co.* v. *DePasquale*, *supra*, 47 U.S. L.W. at 4904, are satisfied here. The order closing the pretrial suppression hearing was lifted by a guilty plea and was, therefore, too "short-lived" to provide for full review. Also, petitioner, owner and operator of the Daily News, the newspaper with the largest circulation in the United States, can reasonably be expected to be subjected to similar closure orders in the future.

Reasons For Granting the Writ

1. This Case Squarely Raises The Issue, Expressly Reserved By This Court In *Gannett*, Whether The First Amendment Guarantees The Press And The Public A Right To Attend Pretrial Suppression Hearings.

In this case, despite the trial court's finding that "there has not been that much publicity," a record that showed moderate and sporadic publicity and a county of venue with a population of approximately 1½ million, exclusion of the press and the public was sustained in a perfunctory opinion by the New York Court of Appeals. This case raises squarely the issue reserved in *Gannett Co.* v. *DePasquale*, 47 U.S.L.W. 4902 (July 2, 1979): whether there is a right protected by the First Amendment to attend criminal proceedings.

In *Gannett* only two Justices reached the First Amendment issue. Justice Powell found a First Amendment right to attend a criminal proceeding, *id.* at 4910 (Powell, J., concurring); Justice Rehnquist rejected any such right. *Id.* at 4912 (Rehnquist, J., concurring). Justice Stewart, writing for himself and apparently also for the Chief Justice and Justice Stevens, found it unnecessary to decide whether there was such a First Amendment right because "this putative right was given appropriate deference by the State *nisi prius* court in the present case." *Id.* at 4908. Having concluded that the Sixth Amendment created a public right to open criminal proceedings, the four dissenting Justices expressly declined to decide whether the First Amendment also granted a right to be present at criminal proceedings. *Id.* at 4923 (Blackmun, J., dissenting).

The assumption in *Gannett* underlying the majority's refusal to reach the First Amendment issue, that is, that the press's putative First Amendment right had been

given appropriate deference by the trial court, simply cannot be entertained here. In *Gannett* this Court upheld the exclusion of the press from a pretrial suppression hearing in a "very unique situation." *Id.* at 4911 (Powell, J., concurring). The venue was Seneca County, New York, population 36,000; the charge, murder; the victim, a policeman who had lived his entire 42 years in Seneca County. The story received extensive publicity as it unfolded: the report that the policeman was missing; the arrest of the two suspects; the suspects' leading the police to the murder weapon; the suspects' making admissions or confessions before waiving extradition. Some of these facts appeared on the front page; all of them were prominently featured in the local press and on television and radio within this small county. Thus, at the commencement of the pretrial suppression hearing, defense counsel could persuasively argue, as the Court of Appeals recognized, that their clients' ability to receive a fair trial had already been jeopardized and that exclusion of the public from the hearing was absolutely necessary. *Gannett Co.* v. *DePasquale*, 43 N.Y.2d 370, 375, 372 N.E.2d 544, 546, 401 N.Y.S.2d 756, 758 (1979), *aff'd*, 47 U.S.L.W. 4902 (July 2, 1979). There were, therefore, specific and very persuasive facts demonstrating an imminent threat to the impanelling of a constitutionally impartial jury. *Id.*, 43 N.Y.2d at 380.

Except for the charge—murder—there is no similarity between the unique facts in *Gannett* and the unfortunately rather ordinary facts of this case. Here, venue is in Bronx County, population 1½ million. The victim was not well-known. The original story about the crime and the arrest of the suspect Davis did not receive pervasive publicity. Since the time of the indictment and arraignment, there had been no newspaper accounts until one page-13 article in the New York Post reporting the upcoming suppression hearing. There had been no reports at all in the two New York City daily newspapers with the largest circulations, the Daily News and the

New York Times. In fact, in this case, the trial court specifically found that "there hasn't been that much publicity" (9a) and that, given the existing level of publicity, a fair and impartial jury could be selected (9a). Unlike *Gannett* this case simply did not present a "very unique situation" of extensive publicity within a very sparsely populated county of venue. Rather, as the trial court found, there was much less publicity than in *Gannett*, and it was disseminated and to be disseminated within a county of venue forty times more populous. There simply was no reasonable basis for concluding that, given the sizeable pool of jurors, it would be difficult to select an unbiased jury.

The trial court's specific finding that "there hasn't been that much publicity" and the enormous population of the county of venue make it clear that, if there is a First Amendment right to be present at pretrial suppression hearings, it received no more than lip service in this case. Thus, this case, unlike *Gannett*, directly presents the issue of whether such a right exists because the trial court here, unlike the trial court in *Gannett*, cannot be said to have given the First Amendment right "all appropriate deference." *Gannett Co.* v. *DePasquale*, *supra*, 47 U.S.L.W. at 4908.

Because the closure order in this case did not adequately consider the First Amendment interests of the press and the public and because this Court has yet to decide the First Amendment issue raised in this case, it should grant certiorari to review the judgment below.

2. The Opinion, Concurrences And Dissent In *Gannett* Do Not Provide A Trial Court With Guidance On The Standard To Use In Ruling On Closure.

A trial court faced with the important and delicate question of whether to exclude the press and the public from pretrial suppression hearings cannot find in *Gannett*

Co. v. *DePasquale, supra*, a standard to apply which commands a majority of this Court. The positions articulated in *Gannett* include permitting closure on consent of all parties, permitting closure in the unguided discretion of the trial court, and permitting closure only upon a finding that exclusion is strictly and inescapably necessary to protect the fair trial guarantee.

The majority opinion appears to limit closure to cases in which all parties, defense and prosecution, consent. The question is framed and answered as limited to cases where all participants consent. *Id.*, 47 U.S.L.W. at 4903, 4906. However, the majority also approves the standard for closure applied by the trial court in *Gannett*, namely, that "an open proceeding would pose a 'reasonable probability of prejudice to [the] defendants.'" *Id.* at 4909. Since this standard was applied in *Gannett* in a case where all parties did in fact consent to exclusion, a trial court faced with an exclusion motion where the prosecutor objects to closure will surely be confused as to whether the reasonable probability standard should be applied.

Indeed, even if "reasonable probability" is the standard to apply in cases where the prosecutor does not consent, this formulation is supported at most by only three Justices (the Chief Justice and Justices Stewart and Stevens). Justice Rehnquist opted for a standard which would leave the issue of exclusion to the unguided discretion of the trial court. *Id.* at 4912 (Rehnquist, J., concurring).

Justice Powell, on the other hand, sets a standard which is stricter than the one imposed by the majority opinion. He is the only Justice voting with the majority who addresses the question of burden of proof; along with the four dissenting Justices, Justice Powell places that burden on the defendant seeking closure. Justice Powell would require a defendant to show "that the fairness of his trial likely will be prejudiced by public access to the proceedings." *Id.* at 4911 (Powell, J., concurring).

He would also require the trial court to "consider whether there are alternative means reasonably available by which the fairness of the trial might be preserved without interfering substantially with the public's interest in prompt access to information concerning the administration of justice." *Id.*

Justice Blackmun, writing for himself and for Justices Brennan, White and Marshall, places the burden on the party seeking closure to show "a substantial probability that irreparable damage to his fair trial right will result from conducting the proceeding in public." *Id.* at 4921 (Blackmun, J., dissenting). This showing involves consideration of the nature and extent of prior publicity and the size of the pool from which the jury will be selected. The party seeking closure must also show "a substantial probability that alternatives to closure will not protect adequately his right to a fair trial." *Id.* at 4922. Continuance, severance, change of venue, voir dire, additional peremptory challenges, sequestration and admonition to the jury are the alternatives the trial court is required to consider. *Id.*

Thus, a trial court presented with a motion by a defendant for closure of a pretrial suppression hearing can only be completely confused by searching the *Gannett* case for a standard to apply. If the prosecutor opposes the closure motion, it is unclear whether the majority opinion, limited as it appears to be to cases where all parties consent, can be applied. If it is applied, however, it gives no guidance on which party has the burden of proof, how that burden is to be met or whether alternatives to closure must be considered. Justice Rehnquist's opinion offers no further help because he leaves the decision to the trial court's unguided discretion, a view rejected in one way or another by at least seven other Justices. Interestingly, Justice Powell and the dissenters —taken together, a majority of the Court—agree on two

principal issues: they place the burden of proof on the party seeking closure and require the trial court to consider alternatives to closure. They disagree, however, on the standard to apply: Justice Powell opts for "likelihood of prejudice," the dissenters use "substantial probability."

This case presents an appropriate opportunity for this Court to provide a standard to apply which commands a majority. Five members of this Court have found a constitutional right enjoyed by the press and the public to be present at pretrial suppression hearings—one Justice grounding it in the First Amendment, four others in the Sixth Amendment. Two other members of the Court, although reserving on the existence of a First Amendment right, find at least a strong societal interest in open proceedings in criminal cases. Thus, at least seven members of this Court agree, albeit for different reasons, that the right of the press and the public to be present at pretrial suppression hearings is an important constitutional or societal right. That important right cannot be appropriately protected if, when closure is sought, trial courts are compelled to seek guidance from a case that fails to command a majority as to the placement of the burden of proof and the standard for determining when that burden has been met.

The trial court's order in this case would fail to meet any standard suggested in the *Gannett* decision except for Justice Rehnquist's standard of unguided discretion. Given the trial court's finding of moderate publicity and the vast size of the jury pool, it was not "reasonably probable" or "likely," much less "substantially probable," that it would be difficult to select a fair and impartial jury. Nor did the trial or appellate court in this case give any real consideration, as required by Justice Powell and the four dissenting Justices, to alternatives less restrictive than closure. More extensive voir dire and granting additional peremptory challenges would in this

case have been more than adequate. Continuance, change of venue or sequestration, although probably an overreaction, would also have given complete protection to the accused's right to a fair trial without unnecessarily infringing First Amendment rights and interests.

The question presented by a closure motion involves a sensitive balancing of important constitutional and societal rights and interests. Trial courts that must make decisions balancing these rights and interests should be given clear guidance as to placement of the burden of proof and the proper standard to apply in determining when that burden has been met.

3. This Case Does Not Present A "Very Unique Situation" As In *Gannett;* Rather It Presents The Issue Of Closure In The Factual Context—Moderate Publicity And An Urban County Of Venue—More Usually Presented To Trial Courts.

The *Gannett* case is unique for several reasons but the one of primary importance involves the county—Seneca County, New York—where the crime occurred and the hearing was held, and from which the jury was to have been selected. The population of Seneca County was 36,000 The victim was a well-known police officer. The extensive prior publicity concerning the murder, the hunt for the killers and their arrest, and the fact that many people in the county were personally acquainted with the victim, justified a fear that every citizen of Seneca County was aware of this crime. Similarly, these unique circumstances also supported a finding that most if not all potential jurors would learn, either through the media or through conversations with neighbors, the prejudicial facts which would be revealed during the pretrial suppression hearing. These unique circumstances justified closure in *Gannett*, but are much too aberrational to provide trial courts with general rules and standards for balancing

sensitive rights in the vast majority of cases with which they will be confronted. Indeed, unless the rules and standards, none of which commands a majority of this Court, are clarified in the context of a more usual and recurring set of facts, important constitutional rights and interests will be needlessly sacrificed.

The vast majority of crime in this nation takes place in our densely populated towns, cities and counties. United States Department of Commerce, *Statistical Abstract of the United States at* 177-79 (1978). In determining whether there is a realistic danger of difficulty in finding fair and impartial jurors, the population and the nature of the county of venue are of critical importance. Plainly, a heavily populated urban county can absorb much more publicity than a lightly populated rural county without reaching the saturation point. This is so not only because of sheer numbers of people, for example 36,000 as compared to 1½ million, but also because of the relative anonymity of city life as compared to life in small towns or rural areas and the overwhelming barrage of information—news, entertainment, commercial—which inundates urban areas making any one story, particularly a local one, much less prominent than a similar story in a rural area.

The best way to illustrate this point is to suppose that the murder involved in the *Gannett* case had occurred in Bronx County, one of the most populous counties in the United States within one of the most media-intense metropolitan areas in the world. The story would have received media attention but it would have been reported with stories of other crimes of the same or more significance, as well as other reports of international and national interest. The coverage would not have been as prominent originally, nor would it have been sustained for as long in New York City as it was in Seneca County. Nor would it have become an item of everyday conversation since

the victim and the accused would normally be personally known to no more than an infinitesimal fraction of the people in the Bronx.

None of this is to say that there are no cases in urban areas where closure is necessary. The extraordinary intensity of publicity concerning the murders committed in New York City over a one-year period by the so-called "Son of Sam" killer could be said to raise a danger that most, if not all, of the prospective jurors would be influenced by prejudicial disclosure of potentially tainted evidence. *People* v. *Berkowitz*, 93 Misc. 2d 873, 403 N.Y.S. 2d 699 (Sup. Ct. Kings Co. 1978). There are no doubt other similar albeit aberrational cases.

This Court and others have in the past considered the population of the county of venue as significant in assessing whether there was a realistic danger that it would be difficult to select unbiased jurors. Chief Justice Burger in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976), found a population of 80,000 to be "a substantial pool" from which to select an impartial jury despite "intense and pervasive" publicity. *Id.* at 563 and 563 n.7. *See also, State* v. *Joyce*, 160 N.J. Super. 419, 390 A.2d 151 (1978). The majority in *Gannett*, however, does not address the weight the trial court should give to the population and nature of the county of venue. While Justice Powell's concurring opinion refers to the "very unique" facts presented in *Gannett*, presumably referring in part to the rural and sparsely populated county of venue, it nonetheless gives no guidance on the importance of the size of the jury pool.

This case gives this Court the opportunity to clarify the significance of the size of the jury pool to the decision to exclude in the kind of case that will usually be presented to trial courts.

4. *Gannett* Provides No Guidance Where, As Here, The Parties Do Not Consent To Closure And The Prosecutor Argues And Petitions For An Open Pretrial Suppression Hearing.

The majority opinion of this Court in *Gannett Co.* v. *DePasquale*, *supra*, was specifically limited to closure where all parties expressly consented.

> "The question presented in this case is whether members of the public have an independent constitutional right to insist upon access to a pretrial judicial proceeding, even though the accused, the prosecutor and the trial judge all have agreed to closure of that proceeding in order to assure a fair trial." *Id.*, 47 U.S.L.W. at 4903.

In this case the prosecutor did not consent to closure. Rather, the prosecutor argued for an open courtroom and initiated proceedings in the nature of prohibition against the trial judge after he ordered closure.

Although finding no constitutional right of access for the public in the Sixth Amendment right to a public trial and reserving decision on the First Amendment issue, this Court's majority recognized "a strong societal interest in public trials" and in open judicial proceedings. *Id.* at 4906. The majority believed that the "strong societal interest" in open criminal proceedings would be protected by the parties to the litigation.

> "In short, our adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation." *Id.* (footnote omitted).

In a criminal proceeding, the prosecutor as a party and as a public official is in a unique position to assess both

interests and to argue where appropriate for open proceedings. As the majority recognized, "[t]he responsibility of the prosecutor as a representative of the public surely encompasses a duty to protect the societal interest in an open trial." *Id.* at n.12.

Petitioner does not argue that the prosecutor's objection to closure is necessarily dispositive. Justice Stewart makes it clear that the trial court has the same obligation as the prosecutor to assess the societal interest in open proceedings and the accused's right to a fair trial. *Id.* at n.12. Nevertheless, the prosecutor's position on closure is obviously of great significance in assessing the public's interest in open proceedings.

Despite the importance of the prosecutor's role in determining whether closure is appropriate, the *Gannett* decision gives no guidance on the weight to be accorded to the prosecutor's position. Should it be presumptively adopted? Under what conditions should the prosecutor's judgment that closure is inappropriate be overruled? The result is that, whenever a trial court is faced with disagreement on closure, it will be in total confusion as to the proper weight to be given to the prosecutor's position as a party and as a representative of the public interest.

This case presents that issue squarely. The prosecutor argued in the trial court for open proceedings. The Assistant District Attorney pointed to the relatively moderate level of publicity, the overwhelming size of the jury pool and to the particular public interest focused on judicial and prosecutorial accountability for criminal proceedings against juveniles (3a-4a, 7a-9a). Despite this Court's decision in *Gannett Co.* v. *DePasquale, supra*, the New York Court of Appeals in its perfunctory opinion entirely ignored the critical distinction between this case and *Gannett*: the prosecutor's failure to consent and his

status as a petitioner seeking an open hearing in the public interest in this case; his consent to closure in *Gannett*. By approving closure in this case where the prosecutor petitioned for an open hearing, and by doing so without even recognizing the importance of the distinction between this case and *Gannett*, the New York Court of Appeals has extended this Court's majority opinion in *Gannett* well beyond its express limits—beyond a case where all parties consented to closure. Moreover, it has done so without alluding to, much less discussing, the standard to be used in assessing the prosecutor's opposition. Under these circumstances, trial courts are effectively instructed to disregard the prosecutor's status as guardian of the public's interest in open trials.

This case presents the Court with the opportunity to explain how the closure issue should be resolved when the prosecutor argues for open proceedings.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the New York Court of Appeals.

Respectfully submitted,

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October 4, 1979

APPENDIX

Excerpts From Proceedings of March 20, 1979

SUPREME COURT

BRONX COUNTY

TRIAL TERM — PART XVI

(Omnibus Hearing)

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

ROBERT DAVIS,

Defendant.

March 20, 1979
Bronx, New York

Before: THE HON. HOWARD E. BELL,
Justice.

APPEARANCES:

For the People:

MARY BETH ABBATE, ESQ.
Assistant District Attorney

For Defendant:
STANLEY GREEN, ESQ.

EVELYN M. STIER, R.P.R.
Official Court Reporter

Excerpts From Proceedings of March 20, 1979

THE COURT: Yesterday a motion was made by Mr. Green, Defense Counsel, to exclude the press from the courtroom during the pretrial hearing.

At that moment I denied the motion and I said it is denied "for the time being." I wanted to wait and see what was developing with respect to the alleged crime on the subways and the publicity that the press would be giving to Mayor Koch's new order with respect to that crime and, of course, it was given a great deal of publicity last night on TV; that is, the Mayor's orders and crimes on the subway and the Mayor even rode the subway home himself. I saw him on TV with bodyguards standing. On his way home he was on the air talking to the reporters and, also, it was reported that there were three crimes allegedly committed last night in spite of the beefed up patrols with respect to those subways.

But what amazed me, on one newscast, I think it was Channel 11, immediately at the conclusion of the statement with respect to crime on the subways or the "beefing up," if I might use that term, of the police on subways, I believe the commentator said "Too bad they didn't have that back in September when Davis," the defendant in this case, "allegedly participated in the killing of"——

MRS. ABBATE: John Hernandez.

THE COURT: "John Hernandez."

Thereafter, there was a picture that was shown, a wedding picture of the deceased Hernandez and his wife which flashed on television.

On the newscast this morning on NBC at 7:30, while using my electric shaver, I heard the newsman say that Davis was going on trial today and the Court was conducting pretrial hearings; that there will be introduced into evidence a videotaped statement by Davis

wherein he allegedly admitted the killing of Hernandez. That was on NBC News this morning.

MRS. ABBATE: I didn't hear that.

* * * * *

THE COURT: I'm inclined to give you [defense counsel Green] an opportunity to renew your application. I did not deny it. I said "for the time being." I don't know if she got it or not, but I did say "for the time being."

I'm inclined to give the press a chance to be heard.

MRS. ABBATE: I think you have to.

* * * * *

THE COURT: Miss Abbate, do you wish to be heard?

MRS. ABBATE: Yes, I do, your Honor. The People are put in the unusual position of—of course, their primary interest being the right of Robert Davis to a fair trial.

But we also feel that we have a right to protect the People's right to know. The cases which speak about the exclusion of the press from the courtroom, speak about cases in which the interest of the People are not a legitimate interest.

They arise merely from curiosity. This particular case is not a case in which the public's interest is one of merely curiosity.

It is not a vile murder in the sense of lurid details.

It is not a love triangle case.

It is not a case involving anybody famous, where the facts are the reason that the public would be interested in knowing.

Rather, it is a case of historical importance, at least in the legal and legislative sense.

The case which is going before your Honor is the first case in the history of New York to try a 13-year-old for murder.

It is a case involving differing philosophies of law, different philosophies of social conduct, and dealing with people within the system of justice.

Now, the legislature in changing the law to allow a 13-year-old to be tried for murder shows one particular philosophy: It was a hotly debated, hotly contested issue in which all of the People of New York were interested.

Their interest comes from that philosophical change, from the philosophical direction in which the laws and the legislation's intent is going to go.

It is not a case in which the basic interest, whether it be TV, curiosity of the people are aroused—it is rather one of historical importance, it is one in which the People want to know, and they have spoken in passing this legislation—wants to know whether 13-year-olds can and should and are being dealt with properly in the adult system.

The interest in this involves interest in legislative determinations, legislative actions, judicial determination and, of course, penal interests.

It is our position that certainly in this case more than any other case that has ever gone before, the People should be given the right to know and they're given the right to know by way of the press, and to exclude them is to say the People have no right to know what is happening as a result of their legislative interests, and we suggest the press should not be excluded. The motion should again be denied.

Excerpts From Proceedings of March 20, 1979

THE COURT: Actually I shall not make any disposition of this application at this time without at least hearing from a spokesman for the press.

Yesterday when I denied the defense counsel's motion I indicated that the motion was denied presently, which I assume left counsel with the understanding that the Court would entertain a further application with respect to the exclusion of the press from the courtroom and I have to admit that I have heard certain reports—I saw a report on TV last night and I'm not in the position to state precisely what it said but it was somewhat tied in with the Mayor Koch's increasing policemen on the subways.

I also heard possibly 7:28 or 7:25 this morning on NBC a statement that the District Attorney was going to show on videotape in this courtroom this morning a statement allegedly made by the defendant to the effect that he committed the crime.

Now, I was greatly concerned about that. I don't know how many people in the City of New York—Well, I'm not necessarily concerned about the people of the City of New York, I'm concerned about the people in the Bronx because those are the ones that we'll have to bring into this courtroom, and try to select 14 persons from amongst the group that we will bring into this courtroom who could be fair and who could give this defendant and the People a fair trial.

Both are entitled to a fair trial: The People of the State of New York and the defendant is entitled to a fair trial.

I don't know what effect that statement standing alone would have on any one who heard it.

As I said before, I don't know who heard it. Maybe 100 people heard it. Maybe no one in the Bronx heard it. I don't know.

Excerpts From Proceedings of March 20, 1979

But I am greatly concerned about the First Amendment rights of the press and the Sixth Amendment rights of this defendant.

Once again the Court is confronted with those two Constitutional rights and the Courts have indicated that this Court does have the power to exclude the press from pretrial hearings.

* * * * *

THE COURT: However, as I said, initially this Court cannot and would not dispose of a motion to exclude the press without hearing the press.

Now, I'll have to turn to the jury box because I believe all of the members of the press now are are seated in the jury box and this is a general question I'll have to ask you—generally.

* * * * *

THE COURT: I'm going to ask you or some other members of the press, if you will, see if you can get in touch with the appropriate person and have that person —my clerk here will give you the telephone number; have them call immediately and discuss it with my clerk, and I will arrange to have, if possible, the lawyer who represents the New York Press Club to come here as soon as possible and make an oral argument and from that moment on I will proceed from that point on.

* * * * *

AFTERNOON SESSION

MR. GIULIANI: Your Honor, I'm here to represent the New York Daily News. My name is Rudolph Giuliani. I'm a member of the firm of Patterson, Belknap, Webb and Tyler.

THE COURT: Is there anyone else that represents any other newspaper?

Excerpts From Proceedings of March 20, 1979

MR. GIULIANI: No, your Honor. The only other person here with me is an attorney who's with our firm, Kenneth Caruso.

* * * * *

MR. GREEN: Without having reached the stage of testimony, you heard on the radio this morning, there's a big article on it in this morning's New York Post.

* * * * *

THE COURT: Does the District Attorney wish to be heard on this?

MRS. ABBATE: Yes, your Honor.

As I indicated this morning, the People are in rather an unusual position. Our main concern is to safeguard the rights of the People of the State of New York. We're interested, of course, in the rights of Robert Davis and the rights that he get a fair trial, but we recognize the right of the People also exists.

It is not our position that we are seeking any publicity. We don't necessarily desire any publicity, but we do recognize that this is a historical case, a monumental case, a case in which there is a great deal of interest, legitimate interest and we would submit to the Court, basically, that this is not a lurid case. This is not a case where the public interest and the public right to know arises from mere curiosity.

This is not a love triangle case of any type. This is not a case involving a particularly lurid fact pattern. It is a case which involves the trial of the first 13-year-old in the history of the State of New York for murder.

It's a case which involves philosophical opinions or philosophical views which are held by the People of the State of New York regarding what is proper for a 13-year-old. It involves social interests. It involves judicial interests.

Excerpts From Proceedings of March 20, 1979

The law which was passed which allows this trial to go forward is a law hotly debated and hotly contested and which was passed in response to the will of the People of the State of New York.

They, in effect, wanted to know what was happening to juveniles. Before the law was passed juveniles, 13-year-olds, were treated in complete secrecy. The People in the State of New York, in effect, through their legislature said: That is not satisfactory. We are not happy. We want to know how they are treated and see that they are treated fairly, of course, but that they are treated justly; justly in our interests, to be punished if convicted; treated justly in another way, if they were acquitted.

It is our position that because this case does not arise —the interest in this case does not arise out of mere curiosity, but is founded, is based in the very real, the very important, the very recognizable, historical, philosophical and social interests of the People of the State of New York that they have a very legitimate and a very strong right to know.

When we get into the family, we're into another question entirely. Certainly this defendant has a right to have family and friends present. That cannot prejudice him.

The murder of 19-year-old John Hernandez, a newlywed, was a great tragedy to his family. I see no way in which their presence in the courtroom can in any way prejudice this defendant. I think it would be a very—

THE COURT: Let me interrupt you there, Mrs. Abbate. I assure you and I can tell you now without any hesitation that if the defendant's family remains, the victim's wife will be permitted to remain. I need no further argument with respect to that.

MRS. ABBATE: Thank you, your Honor.

Excerpts From Proceedings of March 20, 1979

On the question of the jury panel as raised by Defense Counsel, Counsel is a very able attorney. This Court is a very able jurist. I'm sure during the course of the voir dire the problem, if it exists at all, of anyone who has read the pretrial publicity in this case would be able to be handled at that time.

That's the purpose of voir dire. We seek in the voir dire to get twelve people best suited to sit on this particular case. We ask them the pertinent questions and if they have been influenced by publicity, if there be any, they would be excused.

I can't conceive that in all of Bronx County we couldn't get twelve people to be fair and impartial on this case even if the press were allowed to stay.

* * * * *

THE COURT: Well, let me interrupt you again, Mr. Giuliani. I will concede or agree with you there hasn't been that much publicity with respect to this case. We haven't had the glaring headlines that you would receive in certain cases.

My concern, for instance, if we were in the process of selecting a jury today, there's no question in my mind that we could obtain a jury. I'm only anticipating, I'm not concerned about that. I'm anticipating now, this is what bothers me mostly, I don't know what the press is going to do tomorrow or this afternoon if I ever get around to it, I don't know what the person's going to do tomorrow morning with respect to what they might see on that TV.

* * * * *

THE COURT: My only problem here—I'm not worried about the past publicity as of this moment with respect to being able to impanel a jury.

I'm worried about what will happen during the course of the pretrial hearing, how much publicity the evidence that is offered by the People during that period.

Excerpts From Proceedings of March 20, 1979

Now I know you can't tell and I can't tell, and at sometime then, if I found, assuming I let the press remain, at sometime, if I found one day, if I really thought that they were going far afield, because I still have the right to, within limitation to exclude the press at that moment, and this is what bothers me: What will happen, you don't know, I don't know, what will happen starting this afternoon or tomorrow once I start taking testimony at this pretrial hearing? I agree with you. I don't know we've had too much publicity, we haven't had a great deal of publicity, not to the extent that I think his [defendant Davis'] rights have been prejudiced, it is what will happen in the future, and what disturbs me and I indicated it was painful, when they say the videotape, that's all right. But when they say he's already confessed that he murdered the person, that gets a little sticky, really.

You see? Now I don't know what they will write, in all due respect to the members of the press. They're doing their job. If I was sitting there, I would probably—if I could write—I may be a little more explicit, a little harsher than they are. They're doing their jobs. I don't blame them, but I don't know the extent to which the papers or the media will carry. That's what bothers me now. That's really why you are here. And I don't know whether you can answer what will happen or not, because we're dealing in speculation, and that bothers me.

* * * * *

MR. GIULIANI: There have been—I can't predict how difficult or how hard or how easy it's going to be to pick a jury in this case, but there have been situations in which publicity, above and beyond any that you could even reasonably speculate about in this case, has not made it impossible to pick a fair and impartial jury. So I think that spectre which is raised by Defense Counsel, if that is the standard, if that's what's allowed, if any

time a defense lawyer says, "My God. There may be some publicity," the press is thrown out of the courtroom, there's nothing left of the First Amendment and that's really why I'm here.

If on these kinds of facts, with this level of publicity, the press is thrown out of the courtroom, the press' right to be here is very, very tenuous, and we think that when the First Amendment was written in the Constitution, their rights were a lot more than just tenuous.

* * * * *

THE COURT: I realize that this is a borderline case we have here. I do not have a clear cut case.

* * * * *

THE COURT: The Court, certainly in view of the fact that the District Attorney is going to go to the Appellate Division, and I think the District Attorney should, the Court is going to adhere to its original decision, that is, that the press will not be permitted to remain in the courtroom durng the suppression hearing only. That does not mean that the press is excluded from the courtroom during the trial. The suppression hearing will take roughly three days, maybe four. That's the period in which I am excluding the press, not from the trial at all. Now, I understand that the District Attorney wants to take this up.

MRS. ABBATE: That's correct.

* * * * *

Opinion of the Appellate Division

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

5075

MATTER OF NEW YORK NEWS INC.,

Petitioner,

for a judgment under Article 78 of the C.P.L.R. in the nature of prohibition,

—against—

HONORABLE HOWARD E. BELL, a Justice of the Supreme Court of the State of New York, presently presiding in the Trial Term, Part XVI, Supreme Court, Bronx County, and ROBERT DAVIS,

Respondents.

SULLIVAN, J.

On September 19, 1978, John Hernandez was shot and killed on a subway platform in The Bronx, after he had been followed off a train by three youths who were haranguing him and demanding money. Three hours later defendant, Robert Davis, 13 years of age, was picked up by the police as a suspected runaway. During questioning he told a confused story about being a witness to a shooting. He was released to his mother's custody, but was rearrested three days later, arriagned for the murder of Hernandez, and remanded without bail. On October 31, 1978, he was indicted on two counts of murder in the second degree. Bail was eventually set at $5,000 and later raised to $15,000. Unable to make bail, defendant remains incarcerated.

Notwithstanding a newspaper strike in New York City, defendant's initial court appearances received ex-

tensive coverage on television and radio, and in the non-striking newspapers. It was reported that he was the first juvenile to be charged with murder under the State's "tough new juvenile crime law" and the youngest person ever so to be charged in the State of New York. This coverage continued with his subsequent arraignment on the indictment. One of the newspaper articles carried the headline "He's a killer! Widow in court outburst!"

A hearing was scheduled for March 19, 1979, on the admissibility of statements allegedly made by defendant to various police officers and Assistant District Attorneys. Although defendant originally spoke of being a witness to a murder, he apparently eventually implicated himself as an accomplice in the killing. Among those present in the courtroom on March 19 were reporters from Associated Press, United Press International (UPI), the *New York Post* and WPIX (Channel 11). Justifiably apprehensive of the prejudicial effect that widespread publicity would have on any potential jurors, especially in the light of the extensive publicity the case had generated in its earlier stages, defendant moved to bar the public and the press from the courtroom during the hearing. Trial Term denied the request and adjourned the hearing to the next day.

That evening various television and radio stations broadcast stories about a new crackdown by the Mayor of the City of New York on crime in the subways. Interspersed with these accounts were reports of defendant's trial. The next morning, prior to the commencement of the hearing, the Trial Justice advised counsel that he had viewed a telecast the evening before about the efforts to increase police protection on the subways, which concluded with the comment, "Too bad they didn't have that back in September when Davis allegedly participated in the killing of John Hernandez." The comment was followed by a showing of a wedding picture of the deceased Her-

nandez and his wife. The Trial Justice also stated that he had heard a radio report that morning that pretrial hearings were being conducted in the Davis trial and that the People would seek to introduce a videotaped statement by defendant in which he admitted to the killing of Hernandez. At about the same time that the Trial Justice was voicing these concerns the morning edition of that day's *New York Post*, carrying a story headlined "Videotape is Key in Teenager Trial", under an artist's sketch of defendant with his mother in the courtroom, was already on the newsstands.

Significantly, in attendance at the courtroom that morning were reporters from the *Daily News*, the *Post*, NBC, CBS, and UPI. Thus, before a single word of testimony had been taken, and when only a pretrial hearing on a suppression issue was pending, the media were already flocking to the courtroom and the case itself was generating considerable publicity.

In the wake of this sudden burst of renewed publicity which had emerged overnight, the Trial Justice advised the parties that he would reconsider the application for closure, noting that the first he had heard of the videotaped confession was on the morning radio report. An opportunity to argue in opposition was given not only to the People, who had opposed the motion the day before, but also to the press, which, after a recess for the purpose of contacting counsel, had an attorney present to present its position.

Following argument, the Trial Justice ordered that the press and the public, except for the immediate members of the family of defendant and the victim, be excluded from the courtroom during the suppression hearing, but offered to make available daily copy of a transcript of the proceedings, redacted to omit any statements attributed to defendant. He also granted a stay pending review by this court of his order.

At the outset, it ought to be recognized that this is not the ordinary, garden-variety street crime, as the dissent seems to suggest. The case has attracted widespread publicity. Defendant is the first 13-year-old to be prosecuted as an adult under the recently enacted amendments to the Penal Law dealing with juvenile crime. Moreover, he is charged with complicity in the vicious murder of a subway passenger on his way home from work. Because of its hybrid nature as a legal novelty and media sensation, the case is of great interest. In addition, at the time the hearing was to commence, public officials in the City of New York were engaged in a well-publicized campaign against crime in the subways, after the occurence of a series of violent crimes. Obviously, this served to focus more attention on the prosecution of defendant.

The right to a public trial is not absolute and "must be balanced against other interests which might justify the closing of the courtroom to the public." (*United States ex rel. Lloyd* v. *Vincent*, 520 F.2d 1272, 1274.) Consequently, closure of a courtroom has been permitted even over the wishes of a defendant. "The public trial concept has * * * never been viewed as imposing a rigid, inflexible straitjacket on the courts. It has uniformly been held to be subject to the inherent power of the court to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice." (*People* v. *Jelke*, 308 N.Y. 56, 63, citations omitted.) Here, it is defendant who has made the motion to close the courtroom for what is, undeniably, a legitimate interest, the protection of his right to a fair trial. Like the accused in *Matter of Gannett Co.* v. *De Pasquale* (43 N.Y.2d 370, 378), he has asked the court "to ensure that further pretrial publicity would not impermissibly alter [his] status in the public eye from that of a suspected killer to that of a confessed murderer."

At this stage of the criminal prosecution defendant's reasons for keeping any confession or statement from public knowledge are twofold. He seeks to prevent disclosure to potential jurors of the contents of any tainted confession which he is successful in suppressing.* Clearly, "[s]uppressed evidence should not be used to determine a defendant's guilt, not at trial and certainly not before trial through publication of illegally obtained evidence by the media". (*Matter of Gannett Co.* v. *De Pasquale*, 43 N.Y.2d 370, 379, *supra.*)

The closure here is a limited one. As soon as a jury is impaneled and, if necessary, sequestered, or the circumstances are such that the probability of a suppressed confession prejudicing defendant no longer exists, the press will be able to publish whatever it chooses about the suppression hearing. On the other hand, permitting courtroom access to the media, with its capacity to disseminate the details of defendant's confession to every prospective juror in Bronx County, whatever its population, creates a reasonable probability of prejudice which would threaten the impaneling of a constitutionally impartial jury. (See *Matter of Gannett Co.* v. *De Pasquale*, 43 N.Y.2d 370, 380, *supra.*)

Even should none of the statements be suppressed, defendant has an interest in keeping from prospective jurors the fact that a Judge has already found his statements voluntary and constitutionally sanctioned as evidence. This is a material and realistic concern.

The dissent perceives the risk of prejudice as minimal, when balanced against the public's right to know "how the new juvenile offender statutes are working in prac-

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* Since, apparently, the People's case consists chiefly of defendant's admissions, the importance of keeping them from publication cannot be overstated.

tice, including the applicability of suppression issues to cases where the defendant is 13 years old." It is difficult to appreciate how a temporary delay in reporting the details of a confession denies that right. In any event, at the fulcrum of any balancing of these competing interests should be the recognition that there are, or will be, innumerable trials to avail the public of its right to know. On the other hand, defendant, whose liberty is at stake, has only one trial.

The dissent seeks to distinguish *Gannett* by pointing out that the victim there was a public official and locally prominent, whereas the crime involved here is not uncommon in Bronx County. Although, unfortunately, murder is not that rare an occurance in Bronx County, it is equally true that the increasing incidence of violent crimes has made its residents acutely crime conscious and concerned for their personal safety. This is no doubt true of all large urban centers. This concern is reflected in the Legislature's recent amendment of the Penal Law to provide for adult treatment of juveniles such as defendant, along with the public outcry for increased police protection and stricter punishment, including the death penalty. Daily, the focus of the media is on violent crime and its effects, e.g., desolated streets, deteriorating neighborhoods, unsafe subways, and frightened citizens. The public is concerned with violent crime because it is affected by it, and, hence, the report of a 13-year-old boy armed with a gun on a subway would command a significant amount of individual attention. With morning and afternoon newspapers, around-the-clock radio, and at least seven major television stations, it is highly unlikely that the details of a confession to what was apparently a cold-blooded and vicious crime will escape the attention of most potential jurors in Bronx County, an area which has been battered by the trauma of violent crime. And the danger to defendant's right to a fair trial can all be

avoided by withholding the details of any confession until such time as the danger that the verdict may be affected by their premature publication has passed. The precedent exists. The Court of Appeals in *Gannett* (*supra*) expressly sanctioned closure as a discretionary power in the hands of a Trial Judge so that he might fulfill his affirmative obligation to insure a proper balance between a defendant's right to a fair trial and the public's right to an open forum. And, in *Nebraska Press Assn.* v. *Stuart* (427 U.S. 539, 568) the United States Supreme Court intimated that closure was a respectable alternative: "*The County Court could not know that closure of the preliminary hearing was an alternatice open to it* until the Nebraska Supreme Court so construed state law; but one a public hearing had been held, what transpired there could not be subject ot prior restraint." (Emphasis added.)

In this regard the *Gannett* court fixed the judicial responsibility: "To allow public disclosure of potentially tainted evidence, which the trial court has the constitutional obligaiton to exclude, is to involve the court itself in the illegality. This potential taint of its own process can neither be condoned nor countenanced. To avoid becoming a link in the chain of prejudicial disclosures, trial courts have the power to exclude the public from pretrial suppression hearings [citation omitted]. At the point where press commentary on those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue, pretrial evidentiary hearings in this State are presumptively to be closed to the public." (*Gannett, supra*, p. 380.)

At this point we can only speculate as to how much publicity the case will attract. But one fact seems eminently clear. The level of publicity which the dissent would require before the remedy of closure is invoked is precisely the danger that defendant is trying to avoid. And

it is small succor to him to suggest an adjournment between hearing and trial to allow the residual effect of any adverse publicity to abate. Defendant has been incarcerated since last September and he has a constitutional right to a speedy trial.

Closure has one other benefit. In the event of a conviction it obviates the necessity of a retrial, mandated because the adverse effects of publicity, which could have been avoided, resulted in the denial of a fair trial.

Finally, as commendable as is the dissent's concern that approval of this order would set a precedent for closure in a significant number of cases where there is only minimal publicity, it fails to take into account the discernment and sensitivity of our Trial Judges. The concept of a public trial is fundamental to our system. Closure is a drastic remedy, reluctantly invoked in any case, but necessary in those cases where the right to a fair trial, equally fundamental, is jeopardized.

Accordingly, inasmuch as Trial Term properly exercised its discretion, the application for an order in the nature of prohibition, pursuant to CPLR article 78, should be denied and the petitions dismissed, without costs or disbursements.

SANDLER, J. P. (concurring). The question presented is both close and difficult. However, I find the analysis set forth in Judge SULLIVAN'S opinon compelling and ultimately unanswerable.

The public right to know the details of a confession that may ultimately be judicially determined to have been unconstitutionally obtained seems to me to be outweighed by the defendant's right to a fair trial, particularly where the defendant is 13 years old.

LUPIANO, J. (concurring). I concur in the rationale set forth in the majority opinion of Justice SULLIVAN and

add the following observations: First, in *Matter of United Press Anns.* v. *Valente* (308 N.Y. 71, 77), the Court of Appeals declared that "[t]he courts have ever been alert to strike down any infringement or limitation upon the fundamental right of the press freely to publish and distribute news and comments [citations], and we certainly have no disposition or purpose to undermine or minimize it. That right has, however, never been held to confer upon the press a constitutionally protected right of access to sources of information not available to others. Judicial proceedings are viewed as 'a public event', in the sense that 'Those who see and hear what transpired can report it with immunity.' [citation.] But freedom of the press is in no way abridged by an exclusionary ruling which denies to the public generally, including newspapermen, the opportunity to 'see and hear what transpired'." Second, the broad holding of *United Press (supra)* has not been departed from (see *Matter of Oliver* v. *Postel*, 30 N.Y.2d 171, 179). Third, acknowledgment of the critical importance of harmonizing the First Amendment's guarantee of free press and the Sixth Amendment's guarantee of fair trial prompted the organization of the Fair Trial Press Conference in 1969. The conference guidelines recognize that "'[a]ll concerned should be aware of the dangers of prejudice in making pretrial disclosure'" and go on to state that "'[t]he public disclosure of [certain matters] * * * may be highly prejudicial without any significant addition to the public's need to be informed'" (see *Matter of Oliver* v. *Postel*, *supra*, p. 181, n. 3). Fourth, "*Public trials, of necessity, serve a twofold purpose. They safeguard an accused's right to be dealt with fairly* and not to be unjustly condemned (*Estes* v. *Texas*, 381 U.S. 532, 539; 1 Cooley, Constitutional Limitations [8th ed], p. 647) and concomitantly, serve to instill a sense of public trust in our judicial process by preventing the abuses of secret tribunals as exemplified

by the Inquisition, Star Chamber and *lettre de cachet* [citations]" (*People* v. *Hinton*, 31 N.Y.2d 71, 73; emphasis supplied).

The afore-mentioned enumerated observations impel the conclusion that the instant matter is one requiring scrupulous safeguarding of the defendant's *primary* right to a fair trial. The *limited* closure herein is clearly warranted, and as so aptly remarked by the Court of Appeals in *Matter of Gannett Co.* v. *De Pasquale* (43 N.Y.2d 370, 380): "To allow public disclosure of potentially tainted evidence, which the trial court has the constitutional obligation to exclude, is to involve the court itself in the illegality. This potential taint of its own process can neither be condoned nor countenanced."

I also would indorse Trial Term's order as a proper exercise of discretion.

SILVERMAN, J. (dissenting). The District Attorney of Bronx County and New York News, Inc., publisher of a daily newspaper, bring these article 78 proceedings in the nature of prohibition against respondent Honorable HOWARD E. BELL, a Justice of the Supreme Court. Justice BELL is presiding in the Supreme Court, Bronx County, in a certain criminal action, including a suppression hearing, in which the defendant, a 13-year-old boy, is charged with murder under the recent juvenile offender statutes (L. 1978, ch. 481). The petitions seek to prohibit Justice BELL from excluding the press and the public from the pretrial suppression hearings, pursuant to Justice BELL'S oral order to that effect. Justice BELL stated, however, that he would permit redacted transcripts of the proceedings during the pretrial proceedings to be made available assuming redaction could be arranged by the District Attorney and the defense attorney.

Justice BELL'S direction to close the courtroom was made on application of the defendant and after appropriate notice not only to the District Attorney but to the

representatives of the press; and there is only praise by all parties for the Justice's sensitive regard for the procedural regularity of his actions.

The controlling case in the area, to the extent that it is applicable, is *Matter of Gannett Co.* v. *De Pasquale* (43 N.Y.2d 370). In that case, the majority said with respect to a suppression hearing (p. 380): "To avoid becoming a link in the chain of prejudicial disclosures, trial courts have the power to exclude the public from pretrial suppression hearings * * * As the locus of public interest, this determination is to rest with the hearing Judge."

"[P]rohibition is available both to restrain an unwarranted assumption of jurisdiction and to prevent a court from exceeding its authorized powers in a proceeding over which it has jurisdiction * * * If * * * appeal or other proceedings would be inadequate to prevent the harm, and prohibition would furnish a more complete and efficacious remedy, it may be used even though other methods of redress are technically available" (*La Rocca* v. *Lane*, 37 N.Y.2d 575, 578-580). The present case appears to fit within those categories that permit prohibition.

A number of the cases reviewing the closing of courtrooms by a Judge have come up on article 78 proceedings. (*Matter of Gannett Co.* v. *De Pasquale, supra; Matter of Oliver* v. *Postel*, 30 N.Y.2d 171; *Matter of United Press Assns.* v. *Valente*, 302 N.Y. 71.)

None of the parties objects to our assuming jurisdiction in this matter. And the Trial Justice has almost explicitly requested us to do so, saying that he thought the matter should go to the Appellate Division, and staying the proceedings before him pending these proceedings. In the circumstances, it is appropriate for us to accept jurisdiction at this stage of the proceedings with respect to the particular order here sought to be reviewed.

As to the merits: We are of course bound by the decision of the Court of Appeals in *Matter of Gannett Co.* v. *De Pasquale* (43 N.Y.2d 370, *supra*). The majority of the court said (p. 380): "At the point where press commentary on those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue, pretrial evidentiary hearings in this State are presumptively to be closed to the public. * * * Of primary consideration is the public's interest in avoiding any developments that would threaten to truncate a defendant's right to a fair trial." Thus, in the tension between the public's right to know what goes on in its courts and the public's interest to avoid any developments that would threaten the defendant's right to a fair trial, substantial doubts are to be resolved in favor of protecting the fair trial.

But this is not to say that the long-standing tradition of open public hearings is to be accorded no weight. The court said (p. 381) that the magnitude of any genuine public interest "may be found to outweigh the risks of premature disclosure." Thus a balancing of the conflicting considerations is still required.

Public knowledge of what transpires at suppression hearings is an important value. It adds to public understanding of why confessions and other important evidence are or are not suppressed by the courts, whether or not the evidence is reliable. And such public knowledge casts light on the conduct of police, prosecuting authorities and defense in the early stages of criminal cases. (See Comment, The Right to Attend Criminal Hearings, 78 Col. L. Rev. 1308, 1310-1311.) And the public has a right to know how the new juvenile offender statutes are working in practice, including the applicability of suppression issues to cases where the defendant is 13 years old.

Against these considerations is the risk that evidence —here apparently confessions—which ultimately may be suppressed will still come to the attention of prospective

jurors through widespread publicity as to proceedings on the suppression hearing.

Applying the balancing test prescribed by the *Gannett* case, we do not think that the risk of prejudicing the defendant's right to a fair trial is great enough to warrant closing the courtroom in the present case.

The *Gannett* case involved a trial in Seneca County with a population of 36,000 people; a murder of a prominent citizen and public official; and proceedings which had been the subject of intensive, prolonged and pervasive publicity.

In the case at bar, the county is Bronx County with a population of approximately 1½ million; the crime is unfortunately not an uncommon one in the City of New York or in Bronx County—robbery and a murder in the course of the robbery. The crime is alleged to have taken place in the subway, and at the moment subway crime is receiving increased publicity. Neither the defendant nor the victim is a prominent public figure; there is nothing to indicate that either one of them is widely known.

All that distinguishes this case from many other such cases is that this is said to be the first prosecution of a 13-year-old for murder in the felony courts under the new juvenile offender law. And even that is probably no longer true. We read in the newspapers that there are other such prosecutions in progress; this court had another such case on its calendar a week after this one.

We have examined the publicity in this case. It is not nearly comparable in scope with that in the *Gannett* case. Indeed, the Trial Justice recognized this fact, saying:

"I will concede or agree with you there hasn't been that much publicity with respect to this case. We haven't had the glaring headlines that you would receive in certain cases.

"My concern, for instance, if we were in the process of selecting a jury today, there's no question in my mind that we could obtain a jury. I'm only anticipating, I'm not concerned about that. I'm anticipating now, this is what bothers me mostly. I don't know what the press is going to do tomorrow or this afternoon".

All of us on this bench have sat as Trial Judges in criminal cases in the City of New York. And we must all have been struck by the fact that even in cases where there has been very widespread publicity, many prospective jurors have never heard of the case. Indeed, it has been commented that in the famous Watergate cases an astonishing number of prospective jurors said that they had never heard of the case. Compare *State* v. *Joyce* (—N.J. Super. —; 4 Media L. Rptr. 1419, 1423 [June 28, 1978]), where in a county with a population of 320,000, after almost daily newspaper, television and radio reports of a pretrial suppression hearing, in a case involving alleged misconduct in office, perjury, etc., by well-known local political figures, only 3 of 102 prospective jurors stated they had read or heard of the case.

On the present record, we, like the Trial Justice, have only our own experience to go on. In this case, with its characteristics and the present and reasonably foreseeable level of publicity, we doubt that more than a small percentage of prospective jurors will even have heard of the case. We do not believe that opening the suppression hearings will significantly increase the difficulties of obtaining an impartial jury—especially if a week or two were allowed to elapse between the close of the suppression hearings and the commencement of jury selection.

Any prediction of course is subject to error. But in our judgment the risk of prejudicing the trial is sufficiently minor so that we think the courtroom should not

be closed. If the present state of facts requires closing the courtroom during the suppression hearing, we fear that it would be necessary to close the courtroom in a high percentage of suppression hearings in cases where there is any publicity at all.

Our dissent is not based on the view that other remedies are available. As the Court of Appeals said in the *Gannett* case (43 N.Y.2d 370, 380, *supra*) : "Continuance, excessive *voir dire* examinations, limiting instructions or venue changes may prove paltry protection for precious rights". And the practical difficulties of these palliatives in themselves are serious hindrances to the administration of justice. Our dissent is based simply on our view that the risk that press commentary on these hearings will threaten the impaneling of a constitutionally impartial jury in this case is not great enough to warrant closing the courtroom.

We do not mean to limit the power of the Justice presiding at the hearing or the trial to take appropriate future action, including closing the courtroom, as the case and the pubilicity concerning it develop. We only say that at this stage, the hearing should not be closed.

We would grant the petitions and direct judgment under article 78 directing respondent not to close the courtroom during the suppression hearing, without prejudice to the power of respondent, or his successor at a suppression hearing or trial, to close the courtroom, if, in his judgment, circumstances as they develop require or warrant such closure.

SANDLER, J.P., and LUPIANO, J., concur with SULLIVAN, J., in separate opinions; SILVERMAN and ROSS JJ., dissent in an opinion by SILVERMAN, J..

Application for orders in the nature of writs of prohibition and mandamus denied and the petitions dismissed, without costs and without disbursements.

Order of the Appellate Division

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 10, 1979.

Present: HON. LEONARD H. SANDLER, *Justice Presiding*
HON. JOSEPH P. SULLIVAN
HON. VINCENT A. LUPIANO
HON. SAMUEL J. SILVERMAN
HON. DAVID ROSS

5075

MATTER OF NEW YORK NEWS INC.,

Petitioner,

for a judgment under Article 78 of the C.P.L.R. in the nature of prohibition,

—against—

HONORABLE HOWARD E. BELL, a Justice of the Supreme Court of the State of New York, presently presiding in the Trial Term, Part XVI, Supreme Court, Bronx County, and ROBERT DAVIS,

Respondents.

The above-named petitioner having presented a petition to this Court praying for an order, pursuant to Article 78 of the Civil Practice Law and Rules, in the nature of a writ of prohibition prohibiting respondent Bell from excludng the press and the public from proceedings in a criminal action involving respondent Davis, presently pending in the Supreme Court, Bronx County,

Order of the Appellate Division

And said proceeding having been argued by Mr. Rudolph W. Giuliani, of counsel for the petitioner, by Messrs. George D. Zuckerman and Robert J. Schack, of counsel for the respondent Bell, and by Mr. Stanley Green, of counsel for respondent Davis; and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

It is ordered that the application be and the same hereby is denied, and the petition dismissed without costs and without disbursements. [All for Opinion by Sullivan, J., including Sandler, J.P. and Lupiano, J., who also concur in separate Opinions; Silverman and Ross, JJ. dissent in an Opinion by Silverman, J.]

Enter: JOSEPH J. LUCCHI
Clerk.

Memorandum Opinion of the Court of Appeals

COURT OF APPEALS—STATE OF NEW YORK

MATTER OF NEW YORK NEWS INC.,
Petitioner,

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in the nature of prohibition,

—against—

HONORABLE HOWARD E. BELL, a Justice of the Supreme Court of the State of New York, presently presiding in the Trial Term, Part XVI, Supreme Court, Bronx County, and ROBERT DAVIS,
Respondents.

MEMORANDUM. The judgments appealed from should be affirmed, with costs, on the opinion of Mr. Justice JOSEPH P. SULLIVAN at the Appellate Division, with the additional comments which follow concerning the procedures used by the trial court in this matter.

In this case it appeals without doubt that there was a fulfillment of the requirements laid down in *Matter of Gannett Co.* v. *De Pasquale* (43 N.Y.2d 370, aff'd — U.S. — [July 2, 1979]), where the court held that optimal coverage of an event can be achieved "consonant with constitutional free press guarantees, by affording the media access to transcripts redacted to exclude matters ruled inadmissible during the closed suppression hearing * * * Complete transcripts [may be] made available when the defendant's interests [are] no longer in jeopardy. The public's 'right to know' [is] then compatible with the defendants' right to a fair trial" (*Matter of Gannett Co.* v. *De Pasquale, supra*, p. 381). In the instant case the court held that if the press desired, the court would supply complete transcripts of the proceedings during the pretrial motions, except for the redacted portions of yet

inadmissible advissions of the defendant. It continued by noting that the redacting "has to be done by the District Attorney and defense counsel because the court doesn't have the time". Although it was of course perfectly correct for the court to offer to furnish redacted transcripts to the press, it would have been the nondelegable responsibility of the hearing court itself to perform any necessary redaction.

Another matter requiring our comment was the trial court's decision to stay its proceedings pending the determination of this appeal. We granted a preference for argument of the appeal because the criminal trial remained in abeyance pending the appeal. Despite the expedited nature of the proceedings, the defendant's trial, which was scheduled to begin on March 20, 1979 has not yet started. Meanwhile he remains incarcerated, as he has been since September 22, 1978, awaiting the outcome of this collateral matter and the trial which must follow. Although we recognize the broad discretion of the trial courts to stay their own proceedings, we caution that the right of a defendant to a speedy trial is important and should not be sacrificed in the name of these collateral appeals. Only in rare situations, not present here, should a court stay trial proceedings to permit a challenge to rulings permitting the press and public to have redacted transcripts of pretrial suppression proceedings.

Chief Judge COOKE, and Judges JASEN, GABRIELLI, JONES, WACHTLER and MEYER concur; Judge FUCHSBERG taking no part.

Judgments affirmed, with costs, in a memorandum.